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***Pro Hac Vice – Application in Progress***

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12  
13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
15 **SAN JOSE DIVISION**

16 **PHASE FORWARD INCORPORATED,** )  
17 **a Delaware Corporation,** )  
18 **Plaintiff** )  
19 **v.** )  
20 **MARY NOEL ADAMS, individually and** )  
21 **d/b/a PHASE FORWARD** )  
22 **Defendant.** )  
23 )  
24 )

**CASE NO. 05-4232 JF**

**STIPULATED PROTECTIVE**  
**ORDER AND ADDENDUM TO**  
**PROTECTIVE ORDER**  
**(MODIFIED BY THE COURT)**

25 The parties to this action have determined that certain information to be filed  
26 with the Court or produced during discovery by the parties to this action is "Confidential  
27 Information" (as defined in paragraph 1 below), the unauthorized disclosure of which would be  
28 detrimental to the legitimate commercial or privacy interests of the parties. Accordingly,

1 Plaintiff Phase Forward Incorporated ("PHASE FORWARD") and Defendant Mary Noel  
 2 Adams d/b/a Phase Forward ("MARY NOEL ADAMS"), by and through their respective  
 3 counsel, hereby stipulate to the following Protective Order for the protection of confidential  
 4 information, documents and other things produced, served or otherwise provided in this action  
 5 by the parties or third parties:  
 6

7 1. Definition of "Confidential Information". "Confidential Information" is defined  
 8 as follows: trade secrets, sensitive business or financial information; confidential research,  
 9 development, technical or commercial information; and confidential or private personal  
 10 information

11 Pursuant to Fed.R.Civ.P. 26(c), this  
 12 2. Scope of Order. <sup>^</sup> ~~This~~ Protective Order governs the handling of all Confidential  
 13 Information, including documents, testimony, and other information, including all copies,  
 14 excerpts, and summaries thereof, produced, given or filed during discovery and other  
 15 proceedings in this action, including Confidential Information produced, given or filed prior to  
 16 the date of this Protective Order. If any party to another legal proceeding, or a court or an  
 17 administrative agency, through discovery, demands, subpoenas, or orders production of  
 18 information which has come into possession of a party hereto as Confidential Information in  
 19 this litigation, the party receiving such subpoena or order or demand for such Confidential  
 20 Information shall promptly, and before producing Confidential Information to such other party,  
 21 court or administrative agency, notify:  
 22

23 (a) the requesting party, court or administrative agency of this Protective  
 24 Order; and

25 (b) the producing party hereto of the pendency of such discovery demand,  
 26 subpoena or order to produce. (See Addendum to Protective Order).  
 27 <sup>^</sup>

28 3. Persons Subject to Order. The provisions of this Protective Order shall apply to  
 the parties to this action, and any other persons producing or disclosing Confidential

1 Information in this action who agrees to or is ordered to be bound by this Protective Order. As  
2 used herein, "Person" includes both the named parties and third parties who have agreed or  
3 been ordered to be bound by this Protective Order.

4 4. Designation of Confidential Information. Any party and anyone who produces,  
5 gives, or files Confidential Information may designate information as Confidential Information  
6 if it meets the definition stated in Paragraph 1. (See Addendum to Protective Order).  
7

8 (a) Designation of Documents. Documents may be designated as  
9 Confidential Information by stamping "Confidential" or "Confidential —  
10 Attorneys' Eyes Only" (or some other similar legend) on each page prior  
11 to production. A party that in good faith believes any particular  
12 Confidential Information is so sensitive that it should not be disclosed to  
13 a director, officer, or employee of a party, may designate that  
14 Confidential Information as "Confidential —Attorneys' Eyes Only".  
15 Information which is designated "Confidential" or "Confidential —  
16 Attorneys' Eyes Only" shall be used by the parties to this action solely as  
17 described in paragraphs 5 and 6 below.  
18

19 (b) Designation of Deposition Testimony. Deposition testimony may be  
20 designated, in whole or in part, as Confidential Information by oral  
21 designation on the record, in which case the person making the  
22 designation shall instruct the Court Reporter to separately bind the  
23 "Confidential" and "Confidential —Attorneys' Eyes Only" portions of  
24 the deposition transcript and shall instruct the Court Reporter to stamp  
25 the words "Confidential" or "Confidential —Attorneys' Eyes Only," as  
26 appropriate, on each page.  
27  
28

1 (c) Subsequent Designation. Documents, deposition transcripts, and other  
2 information may be designated as "Confidential" or "Confidential —  
3 Attorneys' Eyes Only," pursuant to 4(a) and (b) above, after they have  
4 been produced without having been so designated only under the  
5 following conditions:  
6

7 (i) Persons to whom such documents, testimony, or other  
8 information, have been disclosed must be advised in writing, with  
9 affirmative acknowledgment of receipt in writing, of the new  
10 designation;  
11

12 (ii) The new designation applies only as of the date and time of  
13 receipt of notice by each person notified;  
14

15 (iii) Persons to whom such documents, testimony, or other  
16 information have been disclosed shall not be responsible for any  
17 disclosure to third parties occurring before receipt of notice  
18 described in Paragraph 4(c)(i); and  
19

20 (iv) Persons to whom such documents, testimony, or other  
21 information have been disclosed must be provided with another  
22 copy of the documents, deposition testimony, or other  
23 information that bears the designation.

24 (d) Inadvertent Disclosure. The inadvertent disclosure of "Confidential"  
25 information by a producing party without designation at the time of  
26 disclosure shall not be treated as a waiver of the confidentiality of the  
27 subject matter, nor as a waiver as to the specific information except as  
28 described above.

1           5.     Use Limitations. All Confidential Information that is produced in the course of  
 2 discovery proceedings herein shall be used only for the purpose of preparing for and  
 3 conducting this action (including mediation and/or appeals) and not for any business or other  
 4 purpose whatsoever, and shall not be given, shown, or made available or communicated in any  
 5 way to anyone except those specified below who have read and are bound by the terms of this  
 6 Protective Order, and to whom it is necessary that such Confidential Information be given or  
 7 shown for the purposes permitted under this paragraph. Except for the Court and its personnel, the  
 8 persons to whom Confidential  
 9 Information is disclosed shall, before such disclosure, agree to be bound by this Protective  
 10 Order by signing a copy of the acknowledgment form attached as Exhibit A and advised that  
 11 the violation of the terms of this Protective Order (by use of the Confidential Information for  
 12 business purposes or in any other impermissible manner) will constitute contempt of Court.

14           6.     Persons To Whom Confidential Information May Be Disclosed.

15           (a)     "Confidential" Information. Except as otherwise provided by this  
 16 or as may be otherwise ordered by the Court,  
 17 Protective Order, <sup>^</sup>information designated as "Confidential" shall be  
 18 disclosed only to:

- 19           (i)     outside counsel of record for the parties in this action, and other  
 20 attorneys, clerical, paralegal and other staff employed by such  
 21 counsel or parties;
- 22           (ii)    consultants or experts retained by a party for the prosecution or  
 23 defense of this action, provided that the party, before disclosing  
 24 any Confidential Information to that individual, shall notify the  
 25 opposing party who shall have three (3) days from such notice in  
 26 which to object to such disclosure and five (5) days from such  
 27 objection to move for a protective order preventing or limiting  
 28

1 such disclosure if the parties are unable to reach an agreement  
2 after such objection;

3 (iii) such officers, directors, or employees, including in-house  
4 counsel, of the parties, as counsel, in good faith, requires to  
5 provide assistance in the prosecution or defense of this action,  
6 and for no other purpose;

7  
8 (iv) the Court (only in the manner provided by paragraph 7 below)  
9 and court personnel;

10 (v) any other Person as to whom the producing party agrees in  
11 writing;

12 (vi) witnesses at deposition (where such witness is employed by the  
13 party making the designation) or trial; and

14 (vii) court reporters employed in connection with this action.

15  
16 (b) "Confidential -- Attorneys' Eyes Only" Information. Except as  
17 or as may be otherwise ordered by the Court,  
18 otherwise provided by this Protective Order, information designated as  
19 "Confidential --Attorneys' Eyes Only" shall be disclosed only to  
20 Persons described in paragraph 6(a)(i), (ii), <sup>(iii)</sup> ~~(iv)~~, (v), (vi) and (vii) above  
21 who have agreed or who have been ordered to be bound by this  
22 Protective Order. Notwithstanding the foregoing, all copies of  
23 information designated as "Confidential -- Attorneys' Eyes Only" that  
24 are received or made by the receiving party shall at all times remain in  
25 the custody of outside counsel of record for that party.

26 (c) Disclosure of Confidential Transcripts to the Deponent. Deposition  
27 transcripts containing Confidential Information may be shown to the  
28 deponent for the purpose of correction, but the deponent may not retain a

1 copy of the transcript unless (s)he agrees to be bound by this Protective  
 2 Order by signing a copy of the acknowledgment form.

3 (d) Exceptions.

4 (i) This Protective Order shall not apply to the disclosure of  
 5 documents, or the contents thereof, to persons who were the  
 6 authors or addressees of those documents or who are shown as  
 7 having received copies.  
 8

9 (ii) If a document designated as Confidential Information refers to  
 10 the conduct or affairs of a potential witness, the parties' attorneys  
 11 may discuss such conduct or affairs with the witness without  
 12 revealing that such a document exists, its author, or its source.  
 13

14 7. Without written permission from the producing party or a court order secured  
 15 after appropriate notice to all interested persons, a party may not file in the public record in this  
 16 action any material designated as "Confidential" or "Confidential — Attorneys' Eyes Only." A  
 17 party that seeks to file under seal any information designated as "Confidential" or "Confidential  
 18 — Attorneys' Eyes Only" must comply with Civil Local Rule 79-5.

19 8. If a party contends that any material is not entitled to confidential treatment,  
 20 such party may at any time give written notice to the party or non-party who designated the  
 21 material. ~~If good faith meet-and-confer negotiations do not resolve the dispute, the~~  
 22 ~~material. The party objecting to confidential treatment may thereafter, upon at least five (5)~~  
 23 ~~days' written notice,~~ apply to the Court by motion for a ruling that the document or transcript  
 24 should not be treated as "Confidential" or "Confidential — Attorneys' Eyes Only." Such a  
 25 motion shall be made within a reasonable period of time, after notice of the objection to a  
 26 "Confidential" or "Confidential --Attorneys' Eyes Only" designation is given. The designating  
 27 party shall have the burden of proving the information is Confidential.  
 28





1 are (a) used as exhibits and/or offered into evidence at the trial of this action, and (b) not  
2 covered by any subsequent and inclusive confidentiality order. The Court will retain jurisdiction to  
3 enforce the terms of this Protective Order for a period of six months after the

DATED: ~~March~~, 2006. conclusion of this litigation.

4 April 26, 2006

PEPPER HAMILTON LLP

5  
6 By: 

M. Kelly Tillery, Esquire  
Attorneys for Plaintiff

7  
8  
9 DATED: March , 2006


10 BERENATO, WHITE & STAVISH, LLC

11  
12 By:  4/13/2006

13 Matthew Stavish, Esquire  
14 Attorneys for Defendant  
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(AS MODIFIED BY THE COURT)  
PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: May 10, 2006.

  
~~JEREMY TOGEL~~ **HOWARD R. LLOYD**  
United States District Judge  
Magistrate

**ADDENDUM TO PROTECTIVE ORDER**

Phase Forward Incorporated v. Adams

Case No. C05-04232 JF (HRL)

IT IS HEREBY ORDERED as follows:

**PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER PROCEEDINGS:**

The purpose of these terms is to alert the interested parties to the existence of this Protective Order and to afford the designating party in this case an opportunity to try to protect its confidentiality interests in the court from which the subpoena or order issued. The designating party shall bear the burdens and the expenses of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a party that has received such subpoena, order or demand to disobey a lawful directive from another court.

**DESIGNATION OF INFORMATION:**

Each party or non-party that designates information or items for protection under this Protective Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. A designating party must take care to designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Order.

Mass or indiscriminate designations are prohibited. Designations that are clearly shown to be unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process, or to impose unnecessary expenses and burdens on other parties), expose the designating party to sanctions.

1 **5:05-cv-4232 Notice will be electronically mailed to:**

2 Randy Scott Erlewine rse@phillaw.com

3 David Given dmng@phillaw.com,

4 Spencer Martinez scm@phillaw.com,

5 Laura Thompson LThompstonesq@comcast.net

6 **Counsel are responsible for distributing copies of this document to co-counsel who have not**  
7 **registered for e-filing under the court's CM/ECF program.**